FILED
FEB 21 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 06-863

IN THE
Supreme Court of the United States

SHANE FAUSEY,

Petitioner,

v.

CHERYL HILLER,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Pennsylvania

BRIEF OF AMICUS CURIAE FAMILY RESEARCH COUNCIL IN SUPPORT OF PETITIONER

BENJAMIN W. BULL
Counsel of Record
GLEN LAVY
CHRISTOPHER R. STOVALL
ALLIANCE DEFENSE FUND
15333 N. Pima Road
Suite 165
Scottsdale, AZ 85260
(480) 444-0020

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS* IN THIS CASE 1

SUMMARY OF ARGUMENT 1

THE COURT SHOULD GRANT THE WRIT TO RESOLVE CONFUSION AMONG STATE COURTS ON WHAT STANDARDS ARE NECESSARY TO PROTECT PARENTAL RIGHTS UNDER TROXEL AND THE FOURTEENTH AMENDMENT 2

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Koshko v. Haining,
2007 WL 93237 (Md., Jan. 12, 2007) . 10, 11, 12, 13

Meyer v. Nebraska,
262 U.S. 390 (1923) 3, 9

Parham v. J.R.,
442 U.S. 584 (1979) 6, 10

Prince v. Massachusetts,
321 U.S. 158 (1944) 5, 9

Santosky v. Kramer,
455 U.S. 745 (1982) 10

Skinner v. Oklahoma,
316 U.S. 535 (1942) 3

Stanley v. Illinois,
405 U.S. 645 (1972) 5

Troxel v. Granville,
530 U.S. 57 (2000) 3, 4, 9, 11, 12, 13

Washington v. Glucksberg,
521 U.S. 702 (1997) 8, 9

Other Authorities

Jill Elaine Hasday, *The Canon of Family Law*,
57 STANFORD LAW REV. 825 (2004) 7

INTEREST OF *AMICUS* IN THIS CASE[1]

FAMILY RESEARCH COUNCIL ("FRC") is a non-profit organization located in Washington, D.C. It exists to develop and analyze governmental policies affecting the family. FRC is committed to strengthening traditional families in America and advocates continuously on behalf of policies designed to accomplish that goal.

SUMMARY OF ARGUMENT

FRC contends that respecting fit parents' child-rearing choices in the absence of actual harm to children is the only sure safeguard against the increasingly intrusive demands of the modern state to "micromanage" the American family. In a pluralistic society with government wielding great regulatory power, a more principled boundary than the "best-interests-of-the-child" standard must be interposed between the fundamental liberty of parents to direct the care and upbringing of their children, and non-constitutional claims by third parties contrary to the parents' choices. Absent clear and convincing evidence of compelling circumstances involving actual or potential harm to children, our Constitution should not tolerate government intrusion into the parent-child relationship for the purpose of the state evaluating parents' child-rearing decisions on the basis that it or third parties believe there to be "better" alternatives. FRC urges this Court to grant the Petition and clarify the limits on governmental intrusion into the family.

---

[1]All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. *Amicus* states that no portion of this brief was authored by counsel for a party and that no person or entity other than *Amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

THE COURT SHOULD GRANT THE WRIT TO RESOLVE CONFUSION AMONG STATE COURTS ON WHAT STANDARDS ARE NECESSARY TO PROTECT PARENTAL RIGHTS UNDER *TROXEL* AND THE FOURTEENTH AMENDMENT

The Court should grant the Petition to clarify and reinforce that clear and convincing evidence of harm to children is the logically necessary threshold for state intrusion into the decisions of fit parents as to what is in their children's best interests.

The right of fit parents to direct their children's upbringing without state interference is one of the earliest recognized liberties protected by the Fourteenth Amendment, and should be zealously protected by this Court. Petitioner Shane Fausey has aptly identified the present lack of guidance from this Court on the scope of this time-honored liberty as a situation promoting confusion in the development of the law. *Petition* at 20. Our federal system traditionally commits a great degree of control over family law and other areas of law and regulation touching the family to the states and their courts. Yet, as the regulatory reach of the state steadily expands, states are grappling with the limits on their powers vis a vis the federally-protected fundamental rights of parents. *Amicus* FRC urges this Court to draw that line more definitely at the only location logically consistent with the fundamental nature of parents' rights: harm to the child.

For nearly 100 years, this Court has recognized and steadily guarded the fundamental liberty interest of parents in making decisions concerning their children's upbringing. Parental rights appear very early in this Court's enumerations of those liberties considered fundamental and therefore protected by the Fourteenth Amendment:

> While this court has not attempted to define with exactness the liberty ... guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry, establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (emphasis added). *See also Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (a "basic civil right of man").

Indeed, in the case involving the specific legal concepts which now return for clarification, this Court described the fundamental right of a parent in the strongest terms, as "perhaps the oldest of the fundamental liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion). A parent's fundamental right necessarily includes decisions concerning visitation, custody, religious upbringing and who may associate with one's child. *Troxel*, 530 U.S. at 78-79 ("The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character") (Souter, J., concurring).

In *Troxel*, this Court struck down Washington's third-party visitation statute. The case involved grandparents,

whose son was deceased, petitioning for visitation with their grandchildren. The children's mother opposed the requested visitation. *Id.* at 61-62. In rejecting the grandparents' petition, the *Troxel* Court recognized that third-party visitation, even with a child's relatives, may unconstitutionally burden the parent-child relationship. *Id.* at 64. *Troxel* affirmed the fundamental nature of parents' Fourteenth Amendment liberty interest in directing the care and upbringing of their children, reiterating the constitutional necessity of the presumption that parents act in their children's best interests and that a court may substitute its decision for that of a child's fit parent only in very compelling circumstances. *Troxel* held:

> [S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Id. at 68. *Troxel* struck down Washington's visitation statute because the court failed to presume the validity of the mother's decision to deny the visitation and failed to give "special weight" to that decision. *Id.* at 67. This failure violated the mother's fundamental due process rights.

As Petitioner notes, however, *Troxel* posed and left unanswered the question of "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation." *Id.* at 73. Against the backdrop of this Court's long history of recognition of the fundamental rights of parents, the lack of such a bright-line threshold for state

interference with the exercise of such a venerable liberty interest stands out and demands correction.

This Court's deference to a fit parent harkens back to the days of Solomon. Tradition and experience have taught that the "natural bonds of affection" will lead fit parents to make the best decision concerning their child. *Troxel*, 530 U.S. at 68. As a Nation, we have come to trust that parents – not the state (or its courts) – are best at knowing and protecting their child's interest:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.

Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (citation omitted).

More recently, this Court noted that the state has only a "*de minimis* interest" in a child's care when the child has a fit parent. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Reviewing the foundational principles underlying parental rights jurisprudence, this Court has emphasized protection of the natural rights and duties of parents toward their children against undue state interference:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago

> rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations" ... The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Parham v. J.R., 442 U.S. 584, 602 (1979) (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), and citing 1W. Blackstone, COMMENTARIES 447; 2 J. Kent, COMMENTARIES ON AMERICAN LAW 190).

Indiscriminate use of the "best-interests-of-the-child" standard by courts called to review parental decisions is deeply inconsistent with this Court's parental rights decisions. The "best-interests-of-the-child" standard developed largely in the context of custody disputes *between* parents, a context which counsels caution before extending the standard into different kinds of disputes. Where the competing litigants both have constitutionally-protected parental rights, the court unavoidably must resolve a clash between differing views of what is best for the child, each of which is backed by a presumption that the parent is acting in the child's best interests. There is no alternative to the court breaking the tie, resolving the standoff, and protecting the interests of the child caught in the middle.

However, when courts cross-apply the "best-interests-of-the-child" standard to the much different context of a dispute

between a parent and a non-parent (even one with whom the child has a close relationship), they necessarily cross into the territory of the state potentially substituting its judgment for that of the only litigant holding a fundamental right to direct the child's upbringing. Legal scholars have noted that the "best-interests-of-the-child" standard fits the parent-versus-parent custody dispute context but is not well-suited outside it. *See, e.g.,* Jill Elaine Hasday, *The Canon of Family Law*, 57 STANFORD LAW REV. 825, 850 (2004). Without a bright line threshold forbidding judicial testing of parental decisions against the "best-interests-of-the-child" standard, except where there is clear and convincing evidence of potential harm to the child, there is no barrier to the standard devolving into the court paternalistically second-guessing parental wisdom on its own motion or on that of a non-parental third party.

Allowing courts to test the judgments of fit parents in disputes with non-parents under a "best-interests-of-the-child" standard where there is no showing of potential harm to the child is manifestly inconsistent with this Court's longstanding characterization of parents' rights as "fundamental." Indeed, the constitutional rights of parents ranked as a defining exemplar in one of this Court's hallmark cases on how fundamental rights are identified:

> The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes

> the rights to marry, to have children, [and] to direct the education and upbringing of one's children ....

Washington v. Glucksberg, 521 U.S. 702, 719-720 (1997) (citations omitted).

As the *Glucksberg* decision explains, only those rights with the most ancient pedigree and most elemental connection to American liberty can be described as, and merit protection as, "fundamental":

> [W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," []"so rooted in the traditions and conscience of our people as to be ranked as fundamental"[], and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."

Glucksberg, 521 U.S. at 720-721 (citations and quotations omitted).

Rights that are recognized as fundamental under the Due Process Clause are entitled to the highest protection against infringement:

> [T]he Fourteenth Amendment "forbids the government to infringe ... 'fundamental' liberty interests at all, no matter what process is

> provided, unless the infringement is narrowly tailored to serve a compelling state interest."

Glucksberg, 507 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

The *Troxel* Court did not answer the question of whether a showing of harm is a threshold requirement in the specific context of grandparent or third party visitation claims. Yet the plurality alluded to the harm threshold as a basic principle present in the Court's parental rights case law. *See Troxel*, 530 U.S. at 68-69 (normally no basis for state to question parent's child-rearing decisions so long as parent adequately cares for child).

This Court's parental rights decisions over the decades have generally identified harm to the child as the proper threshold between the parents' fundamental rights and the state's interest in protecting children. For instance, in the seminal parental rights case, *Meyer*, the Court noted:

> No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed.

Meyer, 262 U.S. at 403. *See also Prince*, 321 U.S. at 167 ("the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare").

More recently, the Court has discussed at length the necessity for harm to the child to be respected as a limiting principle on the state's ability to interfere with parents' decisions regarding even matters with potentially very profound consequences on their children:

> As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their children" creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition ... Nonetheless, we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized ... [However,] simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state.

Parham, 442 U.S. at 602-603 (citations omitted). *See also Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents ....").

Since the filing of the Petition in this case, one state high court has recognized the significance in this third party visitation context of this Court's long line of parental rights holdings. In *Koshko v. Haining*, 2007 WL 93237, *17 (Md., Jan. 12, 2007), the Maryland Court of Appeals concluded in a

lengthy and careful constitutional analysis that a threshold showing of parental unfitness or harm to the child is constitutionally compelled before a grandparent visitation claim can be weighed under the best interests standard. This conclusion necessitated the overruling of a substantial line of Maryland case law construing the state's grandparent visitation statute ("GVS"). *Id.* at *19.

In *Koshko*, the Maryland court found that for the GVS to be sufficiently narrowly tailored to satisfy the necessary strict scrutiny raised by such a direct and substantial infringement on the fundamental right of parents to direct the upbringing of their children, more was required than just the bare minimum some courts have thought sufficient to comport with *Troxel*:

> [T]he GVS permits a direct and substantial burden on the exercise of parental rights concerning the control of their children ... The parental presumption we engrafted onto the GVS saves it from *per se* invalidation under *Troxel*, but it is not sufficient, by itself, to preserve the constitutionality of the statute. Although the presumption elevates a Maryland court's decision above the "simple disagreement between the [trial court] and the [parents] concerning [their] children's best interests," disparaged by the Supreme Court in *Troxel*, it does not do enough to protect parents from undue interference with their rights. Fit parents, who are presumed to act in their children's best interests, nonetheless may be hailed into court to defend their decisions absent any showing that they are unfit and without any requirement that the grandparents challenging the parental

> decision plead any exceptional circumstances that may tend to override the parental presumption. A proceeding that may result in a court mandating that a parent's children spend time with a third party, outside of the parent's supervision and against the parent's wishes, no matter how temporary or modifiable, necessitates stronger protections of the parental right. The importance of parental autonomy is too great and our reluctance to interfere with the private matters of the family too foreboding, whether it be in matters of custody or visitation, to allow parental decision-making to remain that vulnerable to frustration by third parties.
>
> ...[I]f third parties wish to disturb the judgment of a parent, those third parties must come before our courts possessed of at least prima facie evidence that the parents are either unfit or that there are exceptional circumstances warranting the relief sought before the best interests standard is engaged. This scheme, applied to the visitation context, would supply the safeguards lacking to tailor suitably the GVS to the State's interests by ensuring that parental decisions entitled to deference are not unduly placed in jeopardy by less significant familial disputes.

Koshko, 2007 WL 93237, *17-18.

The Maryland Court of Appeals' decision in *Koshko* takes pains to harmonize the application of the best interests standard in the third-party visitation context with its well-developed use in the custody context. It is a model of careful balancing between the state's compelling interest in ensuring

the well-being of children and parents' fundamental rights recognized through the decades by this Court. *Id.*

In the wake of *Troxel*, states' views as to the dividing line between parents' Fourteenth Amendment fundamental rights to raise their children and the state's authority to intervene in those decisions can only charitably be described as quite divergent. *See Petition* at 11-20. FRC urges this Court to grant the Petition and answer the question left open in *Troxel,* by holding that a threshold showing of clear and convincing evidence of harm to the child is constitutionally compelled before a grandparent visitation claim contrary to a fit parent's decisions for his child may be weighed under the best interests standard.

CONCLUSION

Amicus FRC respectfully requests that this Court grant Shane Fausey's Petition for a Writ of Certiorari.

Respectfully submitted,

BENJAMIN W. BULL
(Counsel of Record)
GLEN LAVY
CHRISTOPHER R. STOVALL
ALLIANCE DEFENSE FUND
15333 N. Pima Rd., Ste. 165
Scottsdale, AZ 85260
(480) 444-0020

February 21, 2007